85-298

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

vs.

ANDREW K. BURT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

May Colorado's long-arm statute, C.R.S. § 13-1-124, be applied, consistent with the Fifth and Fourteenth Amendments to the United States Constitution, to confer *in personam* jurisdiction over a Nebraska resident whose sole contact with the forum state was to respond to a private, solicited inquiry about the performance of a former student in a Nebraska orthopedic residency program in light of the petitioner's duty to respond to such inquiries wherever any of his ex-students may choose to reside and seek academic references?

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JOHN F. CONNOLLY,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, John F. Connolly, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 20, 1985.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 757 F. 2d 242 and appear as Appendix A hereto. The Memorandum Opinion and Order of the District Court for the District of Colorado, which is not reported, is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 20, 1985. A timely petition for rehearing *en banc* was denied on June 17, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATUTORY PROVISION INVOLVED

C.R.S. § 13-1-124 (1973 & Cum. Supp. 1984):

> *Jurisdiction of Courts.* (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and, if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> (c) The ownership, use, or possesison of any real property situated in this state;
>
> (d) Contracting to insure any person, property, or risk residing or located within this state at the time of contracting; or
>
> (e) The maintenance of a matrimonial domicile within this state with respect to all issues relating to obligations for support to children and spouse in any action for dissolution of marriage, legal separation, declaration of invalidity of marriage, or support of children if one of the parties of the marriage continues without interruption to be domiciled within the state.

———o———

STATEMENT OF THE CASE

The respondent (plaintiff below), a medical doctor, completed a residency in orthopedic surgery at the University of Nebraska medical school in 1977. Several years later, after residing in California, he moved to the State of Colorado and applied for staff privileges at certain

hospitals there. As a result, inquiries were made of petitioner, Dr. John F. Connolly, among others, concerning plaintiff's credentials and medical competence *(See* Appendix C).

Dr. Connolly, in his capacity as Chairman of the Department of Orthopedics and Rehabilitation of the University of Nebraska College of Medicine, responded to a Colorado hospital inquiry as follows:

> In reply to your inquiry about Dr. Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

Appendix D. The respondent contends that as a result of this letter he was denied staff privileges at Colorado hospitals and that his reputation has been harmed.

Respondent brought suit in the United States District Court for the District of Colorado against the Board of Regents of the University of Nebraska and Dr. Connolly on claims of defamation, breach of contract, interference with prospective advantage, and outrageous conduct. Diversity jurisdiction was invoked under 28 U.S.C. § 1332. Respondent later amended his Complaint to add a claim under 42 U.S.C. § 1983 and invoking jurisdiction under 28 U.S.C. § 1331.

Dr. Connolly was, and remains, a Nebraska resident. He owns no property within the State of Colorado, and has transacted no business within the State of Colorado. In short, Dr. Connolly's only contact with the State of Colorado, and the only contact that has been alleged, is

the mailing of the above-quoted letter (Appendix D) to Presbyterian Hospital in Denver, Colorado on October 21, 1980. Appendix B at App. 13 & 15.

The Board of Regents and Dr. Connolly moved to quash summonses and dismiss the Complaint on alternative grounds of lack of *in personam* jurisdiction, Eleventh Amendment immunity, and failure to state a claim upon which relief could be granted. The District Court dismissed the Board of Regents on Eleventh Amendment grounds and dismissed the Complaint against Dr. Connolly for lack of *in personam* jurisdiction, finding that Dr. Connolly's only contact with the State of Colorado was the mailing of his October 21, 1980 letter. The District Court held that although the conduct in question was technically within the reach of the tortious act provision Colorado's long-arm statute, C.R.S. § 13-1-124(1)(b) (1973 & Cum. Supp. 1984), minimum contacts required for the exercise of *in personam* jurisdiction were absent here.

In addressing the foreseeability of being haled into a foreign forum under *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the Court said:

> I cannot conceive the thought a university professor, writing in response to a request for a recommendation concerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

Appendix B at App. 16.

Respondent appealed the dismissal of his claims against the petitioner to the United States Court of Appeals for the Tenth Circuit, which, in a split (two to one)

over Dr. Connolly was precluded by the requirements of federal due process because he lacked sufficient minimum contacts with the forum state.

Subsequent to the district court's decision below, the Supreme Court decided *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), and *Calder v. Jones*, — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). We believe these two cases require us to reverse the district court's conclusion in this case.

The Court in both *Keeton* and *Calder* recognized that "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton*, 104 S.Ct. at 1478 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)); *Calder*, 104 S.Ct. at 1486 (same). The plaintiff in *Keeton*, a New York resident, brought a libel action in New Hampshire against Hustler Magazine, an Ohio corporation with its principal place of business in California. The only connection between either the plaintiff or the magazine and New Hampshire was the sale in that state of the allegedly libelous material. In upholding personal jurisdiction, the Court agreed "that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." 104 S.Ct. at 1479. The Court then concluded:

> "'"A state has an especial interest in exercising judicial jurisdiction over those who commit torts

> within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."' *Leeper v. Leeper,* 114 N.H. 294, 298, 319 A.2d 626, 629 (1974) (quoting Restatement (Second) of Conflict of Laws § 36, Comment c (1971).
>
> This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."

Id. Under *Keeton,* Colorado has a significant interest in the present case.

In *Calder,* a California resident brought a libel suit in California state court against, inter alia, two employees of a national magazine who were residents of Florida and who had prepared the alleged libelous magazine article in Florida. The California Court of Appeals held that personal jurisdiction over the Florida residents was proper. The Supreme Court noted:

> "[T]he [California] court concluded that a valid basis for jurisdiction existed on the theory that [the defendants] intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."

Calder, 104 S.Ct. at 1485-6 (footnote omitted). The Supreme Court affirmed, approving the "effects" test employed by the California court. *See id.* at 1486 n. 6. The

Court concluded that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California," *id.* at 1487, and held that "jurisdiction over [the Florida residents] in California is proper because of their intentional conduct in Florida calculated to cause injury to [the plaintiff] in California," *id.* at 1488.

We believe this analysis is dispositive of the jurisdictional issue in this case. Although the libel in *Calder* was pursuant to a commercial enterprise, whereas here the alleged defamation resulted from a single letter, we do not find this distinction significant in view of the Court's repeated emphasis in *Calder* on the intentional nature of the defendants' conduct and its calculated injurious effect in the forum state. The Court in *Calder* was unpersuaded by the arguments of the defendant reporter and the defendant editor that they personally had no economic stake in their employer's sales in a distant state.

> "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works. . . ."

Id. at 1487.

Nor are we persuaded by Dr. Connolly's claim that it violates due process to hale him into court in Colo-

rado because the letter was, in effect, solicited by Dr. Burt, who gave Dr. Connolly's name to the hospitals. Dr. Burt solicited a letter of reference; he did not solicit a malicious falsehood. Taking Dr. Burt's allegations as true, as we must on a motion to dismiss, we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim. To the extent that Dr. Connolly's statements damaged Dr. Burt's reputation and his ability to practice his profession, the damage occurred in Colorado.

Accordingly, we conclude that the district court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment is reversed on that ground and remanded for further proceedings.

SETH, Circuit Judge, dissenting:

I must respectfully dissent.

The majority relies entirely on *Calder v. Jones*, — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804, but in my view we have only half the elements relied on by the Court in *Calder*. There, the opinion places emphasis on the fact that the story concerned what the plaintiff did in California. Thus: "The allegedly libelous story concerned the California activities of a California resident." The Court also stated that the "article was drawn from California sources." The Court then stated the two elements:

> "In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 [100 S.Ct. 559, 62 L.Ed.2d 490]. . . ."

The Court so applies the "effects" theory where both "the focal point . . . of the story and of the harm" was in California.

In the case before us the letter was, of course, sent to Colorado but the "focal" point of the story was Nebraska. The letter was about what had taken place in Nebraska not Colorado. The story was certainly not drawn from Colorado sources. The action was initiated by plaintiff. We thus have but half a *Calder*. The opinion in *Calder* quotes and relies on the usual minimum contact cases with no comment or criticism. It states at the outset of the opinion of the defendant:

> "It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California."

The Court in a footnote quoted the exact circulation figures for the issue, 5,292,200 total and 604,431 in California. The Court had stated at the outset that:

> "The article was published in a national magazine with a large circulation in California."

The opinion contains a mixture of the minimum contact facts, minimum contact cases, and the "effects" theory. Thus it should be assumed that the "effects" basis referred to by the Court is operative in the context of the minimum contacts doctrine as pressed in the case therein quoted, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559. Thus "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *See also* our cases such as *Premier Corp. v. Newsom*,

620 F.2d 219 (10th Cir.), and *Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir.), where in a specific jurisdiction case we required the minimum contact. *See also* the unilateral activity case, *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283. The unilateral activity of plaintiff was the solicitation in Colorado of the letter of recommendation from defendant in Nebraska. This action necessarily drew the response from defendant to Colorado. *See also Anderson v. Shiflett,* 435 F.2d 1036 (10th Cir.).

Again, the "story" was about what had taken place in Nebraska not Colorado. The *only* connection or contact the defendant had with Colorado was the letter he sent to the Colorado hospital in response to its request that he express an opinion as to the plaintiff's "medical knowledge, technical proficiency," and other qualifications. The plaintiff acknowledges that defendant had a duty to reply and that the hospital solicited the information. It is apparent that this solicitation can also be attributed to the plaintiff.

Again, the letter in issue was a required answer to the inquiry as to Dr. Burt's performance as an orthopedic resident in Nebraska, thus was not unsolicited or gratuitously made. Instead, the action was initiated by plaintiff. The majority opinion at page 245 quotes from *Calder* (104 S.Ct. 1482, at 1487), as to the brunt of the injury and impact on respondent. However, the sentence quoted in part continued with "and in which the *National Enquirer* has its largest circulation." The Court then continued:

> "Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article."

"Under these circumstances" thus includes the extent of the circulation in California and thus the contacts of defendants. The traditional cases were quoted following the above quotation. Again, we have the "contact" ingredient or element of what the Court calls the "impact." It is an impact theory but in a minimum contact context.

The trial court in its evaluation of the facts found that there was no factual basis for *in personam* jurisdiction over the plaintiff. It must be assumed that this included all the elements and thus a determination that the defendant could not anticipate being haled into court in Colorado. The trial court's findings are presumed to be correct. The jurisdictional issue requires and is based on an evaluation of the facts.

Keeton v. Hustler Magazine, Inc., — U.S. —, 104 S.Ct. 1473, 79 L.Ed.2d 790, was decided on the same day as was *Calder*. The contacts aspect was treated at some length. The Court referred to the regular monthly sales of thousands of magazines in New Hampshire and said this "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." Thus there were sufficient "minimum contacts" between defendant and the State to meet due process requirements, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559. The Court in *Keeton* was concerned with the relationship of the plaintiff to the forum State and the First Amendment issue. However, on the contacts element the Court said of the magazine:

> "But respondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises

> out of the very activity being conducted, in part, in New Hampshire."

The Court said also that the harm was done in New Hampshire and there is "no justification" for restricting libel actions to defendant's forum, and:

> "The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U.S. 457, 463 [61 S.Ct. 339, 342, 85 L.Ed. 278].'"

(The Court there quoted *International Shoe.*)

Thus the Court in *Keeton* in what appears to be a specific jurisdictional case or impact case includes the minimum contact doctrine. Again, we must assume that the "impact" theory is appropriate when found in the context of minimum contacts.

As the Court did in *Calder* and *Keeton,* and in our earlier cases, the contacts of the plaintiff with the forum State must be examined. This was again emphasized by the majority and the dissent in *Helicopteros Nacionales de Colombia v. Hall,* — U.S. —, 104 S.Ct. 1868, 80 L.Ed.2d 404, which followed *Keeton* and *Calder.*

In a challenge to *in personam* jurisdiction the plaintiff has the burden of showing the basis for jurisdiction. This is not a heavy burden, but reliance cannot be placed on unsupported allegations in the complaint. These allegations are not taken as true under these circumstances in view of the burden.

In 2 Moore's Federal Practice ¶ 4.41-1[3], at 4-473 (2d ed.), the authors state:

> "On appeal, the trial court's findings on the jurisdictional question are presumptively correct and will be set aside only if clearly erroneous. Even where the trial court reached its decision on the basis of affidavits and other documentary evidence, and did not weigh conflicting evidence or evaluate witness credibility, the standard of review on appeal is the same. The court on appeal will not draw its own inferences and conclusions from the facts in the record."

A footnote quotes our *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358 (10th Cir.).

The trial judge's evaluation of the facts developed by the affidavits should be considered as any other fact determination. The weighing of the facts is necessary in the determination of jurisdiction. *Kulko v. California Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132.

I would affirm the judgment of the trial court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-JM-1850

ANDREW K. BURT,

Plaintiff,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA and JOHN F. CONNOLLY,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed October 1, 1982)

This case is before me upon motions to quash service and dismiss. The action has been commenced by a doctor presently domiciled in the state of California against the Regents of the University of Nebraska and a professor on the University of Nebraska faculty, who is also chairman of the Department of Orthopedic Surgery. The basis for the action is a letter written by Dr. Connolly, the professor, to the Director of Medical Education at Denver's Presbyterian Hospital.

Dr. Connolly's letter states that the Plaintiff has "not been recommended for Board eligibility." It is Plaintiff's theory that publication of this letter results in defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty rights protected by the federal constitution.

Defendants seek dismissal of the complaint upon grounds of immunity and upon lack of *in personam* jurisdiction. The Regents claim to be an agency of the state of Nebraska protected by the eleventh amendment. Dr.

Connolly claims the same immunity, stating he was acting, in this case, as the state's alter ego. Both Defendants further claim their minimal contacts with the state of Colorado render suit in this district an impediment to their due process rights.

Plaintiff counters these arguments first by claiming he would be without redress if the eleventh amendment were applied. He further argues Nebraska law would deny his right to sue these Defendants on his defamation claims.[1]

It seems clear to me, first, that whether the Regents are an agency of the state of Nebraska is principally dependent upon the state law. *Hamilton Mfg. Co. v. Trustees of State Colleges,* 356 F.2d 599 (10th Cir. 1966). Since the question of whether the Regents are an agency of the state of Nebraska has been answered affirmatively, *Catania v. University of Nebraska,* 282 N.W.2d 27 (Neb. 1979), the only remaining question as far as the Regents are concerned is whether the eleventh amendment immunity applies in all respects to the claims raised against them here. That question also must be answered affirmatively. *United Carolina Bank v. Regents Stephen F. Austin State University, et al.,* 665 F.2d 553 (5th Cir. 1982); *Lecompt v. University of Houston System, et al.,* 535 F. Supp. 317 (S.D. Tex. 1982); *Harris v. Arizona Board of Regents, et al.,* 528 F. Supp. 987 (D. Ariz. 1981); *Beckley v. University of Maryland, et al.,* 527 F. Supp. 174 (D. Md. 1981). It is thus evident the Defendant Regents are immune to this action, and the complaint against them must be dismissed.

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[1]Neither ground appears to me to be a valid basis for extending jurisdiction. *See United Carolina Bank v. Regents,* 655 F.2d 553 (5th Cir. 1982).

As far as Dr. Connolly is concerned, I am loath at this moment to say he is vested with eleventh amendment immunity for the simple reason the amended complaint cannot be read only as the Defendant suggests. Taking the averments pertinent to Dr. Connolly in a light most favorable to the Plaintiff, I must conclude there are indications that recovery is sought against Dr. Connolly for his individual acts that would not be in the scope of his acting as and for the state. Hence, were he otherwise subject to unqualified immunity as the state's alter ego, there is a sufficient claim against Dr. Connolly to get the Plaintiff past the eleventh amendment. Nothwithstanding, the complaint against him should be dismissed for other reasons.

Dr. Connolly has moved to dismiss on Rule 12 (b) (4) and (5) grounds. I believe the motion leads to the question of whether the case should be dismissed for lack of *in personam* jurisdiction. *Federal National Bank & Trust Co. v. Moon,* 412 F. Supp. 644 (D. Okla. 1976).

In this case I have considered whether Dr. Connolly ought to be made to defend this action in Colorado. It is clear that if a tort of defamation was committed, the publication element of that tort occurred here in Colorado, thus technically bringing this action within the reach of Colorado's long-arm statute, 1973 Colo. Rev. Stat. § 13-1-124 (1) (b). However, that statute cannot be read in a vacuum, and the due process clause requires certain "minimum contacts." *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

As established in *International Shoe,* insufficient contacts offend "traditional notions of fair play and substantial justice." *Id.* at 316. The standard is whether the De-

fendant could reasonably anticipate being haled into court in this forum. *Le Manufacture Francaise v. District Court,* 620 P.2d 1040 (1980), *citing, inter alia, Worldwide Volkswagen v. Woodson,* 444 U.S. 286 (1980). I cannot conceive the thought a university professor, writing in response to a request for a recommendation concerning a former student who could be applying for a job anywhere in the world, should reasonably be expected to defend an action wherever he sends his response.

Further, I find that it is more reasonable in this action to quash service and dismiss the complaint because I cannot see that this action can continue in federal court. *Sykes v. Beal,* 392 F. Supp. 1089 (D. Conn. 1975). Moreover, even if it were to continue, I do not believe this is the proper forum. Courts generally consider, among other factors, the interest of the state in providing a forum for its residents and the convenience of the parties. As the Plaintiff is no longer even a Colorado resident, he can as easily bring whatever action he might have against Dr. Connolly in Nebraska. Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted, and the complaint and cause of action are dismissed. Each party shall pay his or its own costs.

DATED at Denver, Colorado, this 1st day of October, 1982.

BY THE COURT:

/s/ John P. Moore,

Judge, United States District Court

APPENDIX C

(logo)

PRESBYTERIAN DENVER HOSPITAL
a division of Presbyterian/Saint Luke's Medical Center

1719 East 19th Avenue - Denver, Colorado 80218 -
(303) 839-6000

October 14, 1980

John T. Connolly, M.D.
Program Director
Department of Orthopedics
University of Nebraska Medical Center
42nd and Dewey Avenue
Omaha, Nebraska 68105

Dear Dr. Connolly:

Dr. Andrew K. Burt has made application for staff membership at Vail Valley Community Hospital through Presbyterian Denver Hospital. He states that he had an orthopedic residency at the University of Nebraska. We would appreciate your confirming the above, as well as any other information you might have regarding his medical knowledge, technical proficiency, medical judgment, personal habits, morals, ethics, etc.

Your answer will be confidential.

Sincerely,

/s/ Michael A. Lubchenco, M.D.

Director of Medical Education

MAL:mfw

decision, reversed the District Court's dismissal of the case based on the Tenth Circuit's reading of this Court's decisions in *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 79 L.Ed. 2d 790 (1984) and *Calder v. Jones*, 104 S.Ct. 1482, 79 L.Ed. 2d 804 (1984). Dismissal of the Board of Regents on Eleventh Amendment grounds was not appealed.

———o———

REASONS FOR GRANTING THE WRIT

I. The Decision Below Misapplied And Extended Keeton and Calder Beyond Their Constitutional Limits And Adopted A Talismanic Approach To The Personal Jurisdiction Question, Condemned in Burger King, Which Avoids A Minimum Contacts Analysis.

The decision below decided a significant question of federal law involving important public policy considerations in a manner flatly contradictory to prior decisions of this Court.

In its opinion, the Tenth Circuit Court of Appeals mechanically applied *Keeton* and *Calder* in an analytical vacuum to a situation constitutionally distant from their reasonably anticipated limits, totally ignoring the historically honored "minimum contacts" check on the reach of federal courts. If one who has a duty to respond to an out-of-state inquiry about an ex-student's performance in another state may be sued by the student in the forum of the recipient when the solicited communication constitutes the defendant's sole contact with the forum, then the protections of the Due Process Clause become mere gossamer illusions and the public's interest in the free exchange of candid opinions concerning a medical staff applicant's

prior academic and clinical performance chilled to the point of paralysis.

While purporting to follow the decisions in *Keeton* and *Calder*, the Court of Appeals held simply that:

> Taking Dr. Burt's allegations as true, as we must on a motion to dismiss [*but see, e.g., Land v. Dol'ar*, 330 U.S. 731, 735, n. 4 (1946)], we hold that no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim.

Opinion below at 245; Appendix A at App. 7.

Thus, taking *Keeton* and *Calder* as its cue, the Court of Appeals has adopted a simple mechanical test for deciding if personal jurisdiction may be exercised by the forum state in defamation cases: anywhere an alleged defamatory statement causes harm to the plaintiff, jurisdiction will lie against the defendant. The *Keeton* and *Calder* decisions cannot be read, however, to approve or condone the creation of such a rule for deciding personal jurisdiction issues.

Keeton, 104 S.Ct. 1473, 79 L.Ed. 2d 790 (1984), involved a suit by a New York resident against Hustler Magazine, Inc. in the State of New Hampshire. Although plaintiff had no contacts with the State of New Hampshire, and Hustler was not a New Hampshire citizen, in reliance upon the fact that Hustler Magazine regularly sold and circulated some 10,000 to 15,000 copies of its product in the State of New Hampshire each month, the Court concluded that sufficient minimum contacts existed to impose jurisdiction upon Hustler in that state, stating:

> Where, as in this case, respondent Hustler Magazine, Inc. has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.

Id., 79 L.Ed. 2d at 801-02.

Keeton thus relied exclusively on the regular, systematic, and extensive circulation of a national publication in the forum state to extend jurisdiction under New Hampshire's long-arm statute. *Keeton* is an example of a case in which "general", as opposed to "specific" jurisdiction in the forum state could be found based upon defendant's continuous and systematic activities within the forum state. *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174, 85 L.Ed. 2d 528, 541, n. 15 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 104 S.Ct. 1868, 80 L.Ed. 2d 404, 411 (1984); *compare Perkins v. Benguet Consolidated Mining Co.,* 341 U.S. 437 (1952) with *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957). *Keeton* represents no departure from or extension of cases such as *Perkins* which hold that a defendant who conducts continuous and systematic business in a state may be haled into court there. Such contacts are, however, totally absent here. The Court of Appeals' reliance upon *Keeton* was, therefore, misplaced.

To read *Calder,* 104 S.Ct. 1482, 79 L.Ed. 2d 804, as supporting the personal jurisdiction test that the Tenth Circuit has adopted for defamation cases ignores *Calder's* reliance on multiple connections between the forum state and the defendants' activities. Factual dissimilarities between *Calder* and this case prevent a finding that *Calder* is dispositive of this case. The Tenth Circuit's holding that *Calder* controls here abrogates the "minimum contacts" requirement of the Due Process Clause.

The *Calder* defendants were employees (reporter and editor) of *The National Enquirer,* a publication with a circulation in the forum state of 600,000 issues a week. The story was written for commercial purposes. It was drawn from forum state sources through telephone contacts and written about a resident of the forum state involving her activities in that state. *Calder,* 79 L.Ed. 2d at 812. In light of these facts, the Court concluded that "California [was] the focal point *both of the story and of the harm suffered.*" *Id.* (emphasis added).

The story in *Calder* was not in any fashion invited or solicited by the plaintiff, and the defendants' contacts with the forum state were not in any way the result of the unilateral activities of the plaintiff. The defendants purposefully availed themselves of an existing circulation apparatus and intended the story to be circulated to literally hundreds of thousands of forum state residents. The article was not in any way privileged or confidential.

Judge Seth's dissent to the opinion below points out that "we have only half the elements relied on by the Court in *Calder.*" Opinion below at 245; Appendix A at App. 7 (Seth, J. dissenting). Out of all of *Calder's* operative facts, the only similarity with this case is that here a letter concerning a Colorado resident was mailed into Colorado. That letter, however, did not rely on Colorado sources and did not concern the respondent's activities within Colorado. Rather, sources for statements in the letter, the respondent's academic record and the petitioner's perceptions of the respondent's performance, were entirely within Nebraska. The letter concerned only the activities of the respondent while he was in Nebraska.

In addition, petitioner did not seek out the respondent and hospitals to which he may have been applying for staff privileges, but only wrote his letter in response to inquiries from hospital officials. Those inquiries effectively originated with the respondent himself. As a University of Nebraska medical school department chairman, the petitioner has the duty to respond to such inquiries from responsible parties regarding the performance of his students wherever they may seek to practice medicine. Thus, the petitioner's sole contact with Colorado resulted from the unilateral decision of the respondent to apply for hospital privileges in that state and not from the purposeful actions of the petitioner.

In *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), this court rejected "any talismanic jurisdictional formulas," *id.,* 85 L.Ed. 2d at 549, and held that " 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.' " *Id. Burger King* went on to observe that "[t]he 'quality and nature' of an interstate transaction may sometimes be so 'random,' 'fortuitous,' or 'attenuated' that it cannot fairly be said that the potential defendant 'should reasonably anticipate being haled into court' in another jurisdiction." *Id.*

In applying *Calder* to the present case, the Tenth Circuit Court of Appeals failed to apply any minimum contacts analysis to insure that, even though an interstate transaction had taken place and even though some effect was felt within the State of Colorado, the "quality and nature" of the petitioner's contact with the State of Colorado was not "so random, fortuitous, or attenuated" that

he should "reasonably anticipate being haled into court" in the State of Colorado. *See and compare* decision below with *Fidelity & Casualty Co. of New York v. Philadelphia Resins Corp.*, No. 83-1362 (10th Cir. July 3, 1985).

Burger King established a two-step analysis for determining whether the exercise of long-arm jurisdiction offends " 'traditional conception[s] of fair play and substantial justice' embodied in the Due Process Clause of the Fourteenth Amendment" in a particular case. *Burger King*, 85 L.Ed. 2d at 535.

First, the Court must determine whether the defendant has "purposefully established 'minimum contacts' in the forum State" in order to ascertain whether jurisdiction may be imposed without violation of the Due Process Clause. *Id.*, 85 L.Ed. 2d at 542. If this inquiry is answered in the negative, then jurisdiction may not be allowed.

Second, if the "purposeful availment" requirement is satisfied, then a second tier of analysis requires determination of "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice' " in the case at hand. *Id.*, 85 L.Ed. 2d at 543.

With regard to the first level of analysis, mere foreseeability of causing injury in the forum state "is not a 'sufficient benchmark' for exercising personal jurisdiction." *Id.*, 85 L.Ed. 2d at 542. Rather, " 'the foreseeability that is critical to the due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " *Id.*, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, at 297

(1980). This first level of analysis is designed to insure that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contact or of the "unilateral activity of another party or a third person." *Burger King,* 85 L.Ed. 2d at 542, quoting *Keeton,* 79 L.Ed. 2d at 797; *World-Wide Volkswagen Corp.,* at 299; and *Hall,* 80 L.Ed. 2d at 412.

This court has recognized that " 'some single or occasional acts' related to the forum may not be sufficient to establish jurisdiction if 'their nature and quality and the circumstances of their commission' create only an 'attenuated' affiliation with the forum." *Burger King,* 85 L.Ed. 2d at 543, n. 18; citing *International Shoe Co. v. Washington,* 326 U.S. 310, 318 (1945). The foreseeability of litigation in the forum is substantially diminished where the potential defendant's contact with the forum state consists only of an isolated act. *Burger King,* 85 L.Ed. 2d at 543, n. 18.

The Court of Appeals failed to analyze the "nature and quality" of the petitioner's contacts with the State of Colorado in order to find that petitioner *himself* created a "substantial connection" with the forum state. *Burger King,* 85 L.Ed. 2d at 542. As noted above, any connection with Colorado results not from the petitioner's activities or intent to do harm but from the respondent's decision to locate in Colorado which in turn resulted in routine inquiries into the respondent's background. In such a context there is no foreseeability of out-of-state litigation.

The impropriety of assertion of personal jurisdiction in forums chosen by the unilateral activity of another party has been recognized by this Court in many cases. In *World-Wide Volkswagen Corp.* this Court held that the Due

Process Clause forbids the exercise of personal jurisdiction over out-of-state automobile distributors and dealers whose only tie to the forum state resulted from a customer's decision to drive there. In *Kulko v. California Superior Court,* 436 U.S. 84 (1978), personal jurisdiction in the California courts could not be exercised over a divorced husband sued for child support payments whose only affiliation with the forum was created by his former spouse's decision to settle there. In *Hansen v. Denkla,* 357 U.S. 235 (1958), personal jurisdiction could not be exercised over a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment in the forum state. In these cases, the defendants had no "clear notice that [they are] subject to suit" in the forum and no opportunity to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.,* 444 U.S. at 297; *see Burger King Corp. v. Rudzewicz,* 85 L.Ed. 2d at 542, n. 17.

In the present case, the unilateral activity of the respondent in deciding to locate in Colorado and apply for hospital privileges there resulted in inquiries to petitioner to which petitioner had a positive duty to respond. (Had the petitioner refused to respond in any way, he may even have been subject to suit by the respondent, but not in the State of Colorado, even under then Tenth Circuit's reading of *Keeton* and *Calder.*) Just as in the cases holding that

jurisdiction cannot be based on the unilateral activities of the plaintiff, petitioner here could not "structure [his] primary conduct with some minimum assurance as to where that conduct will and will not render [him] liable to suit." *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Here, the "nature and quality and the circumstances" of petitioner's sole contact with Colorado create only an attenuated affiliation with the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). Under the Court of Appeals' ruling, the petitioner is effectively deemed to have appointed each of his students as his "agent for service of process" wherever they may decide to travel. *See World-Wide Volkswagen Corp.*, 444 U.S. at 296. Such a result does not comport with fair play and substantial justice.

II. Important Public Interest Questions Demand That This Court Review The Decision Below.

The respondent's completion of a residency program in orthopedic surgery does not by itself attest to his competency to practice in that specialty. It does not attest to the quality of work performed by the respondent beyond acknowledgment that the respondent's performance was not so bad as to cause dismissal from the residency program. Like any diploma or certificate of graduation, it does not distinguish those who finish an educational program with an "A" average from those whose average was "C minus" or "D". In short, a certificate of residency does not present a complete picture of the respondent's expe-

rience, qualifications, and competence without the comments of the respondent's instructors and supervisors.

To a very great degree, the medical profession is self-regulated and is charged with a public trust to prevent those from practicing who have not demonstrated competence, or indeed expertise, in the specialized field that they choose. In connection with the duty owed to the public, as well as with their own possible liability for negligence in granting staff privileges without diligent investigation of applicants' backgrounds, hospitals must make inquiry into the skills and competence of those who seek staff privileges. It was in this context that inquiry was made of petitioner regarding the respondent's performance as a resident in orthopedic surgery at the University of Nebraska. The petitioner's response resulted also from a duty to protect the public interest, and, indeed, from his duty to students such as the respondent to respond to inquiries from those who are considering giving employment to the petitioner's students, wherever they may be.

To expect the petitioner to defend suits in any state in which his students may desire to establish a practice because a response that a student's "performance was well below average" may be considered defamatory, not only does not comport with fairness and substantial justice but also has a chilling effect on the flow of information required for the protection of those who require competent, professional medical treatment.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that his petition for a writ of certiorari to the Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

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(Counsel of Record)
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Attorneys for Petitioner

DATED THIS 23RD DAY OF AUGUST, 1985.

APPENDIX A

Andrew K. BURT, Plaintiff-Appellant,

v.

The BOARD OF REGENTS OF the UNIVERSITY OF NEBRASKA and John F. Connolly, Defendants-Appellees.

No. 82-2378.

United States Court of Appeals, Tenth Circuit.

March 20, 1985.

Rehearing Denied June 17, 1985.

Reversed and remanded.

Seth, Circuit Judge, dissented and filed an opinion.

F. James Donnelly of Hannon, Stutz, Dyer & Miller, Denver, Colo. (Robert J. Dyer III, Denver, Colo., with him on the brief), for plaintiff-appellant.

Thomas L. Roberts of Pryor, Carney & Johnson, P.C., Englewood, Colo. (Susan T. Smith, Englewood, Colo., with him on the brief), for defendants-appellees.

Before SEYMOUR and SETH, Circuit Judges, and ANDERSON,* District Judge.

SEYMOUR, Circuit Judge.

Andrew K. Burt, a Colorado resident at the time this action was filed, brought suit against the Board of Regents of the University of Nebraska and John F. Con-

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* Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.

nolly, Chairman of the Department of Orthopedic Surgery at the University. Dr. Burt, a medical doctor, had completed a residency program in orthopedic surgery under Dr. Connolly at the University. Dr. Burt subsequently applied for staff privileges at several Colorado hospitals, which directed inquiries to Dr. Connolly about Dr. Burt's orthopedic residency and general medical competence. Dr. Connolly responded with a very unfavorable letter and Dr. Burt was denied staff privileges. Dr. Burt filed this suit seeking damages for defamation, breach of contract, interference with prospective advantage, outrageous conduct, and the deprivation of property and liberty interests protected by the United States Constitution. The district court granted defendants' motions to dismiss, ruling that the Board of Regents was immune under the Eleventh Amendment, and that the court did not have personal jurisdiction over Dr. Connolly. Dr. Burt appeals the jurisdictional issue, and we reverse.[1]

Dr. Burt alleges in his complaint that the statements by Dr. Connolly were false, willful and wanton, made with malice, and published in Colorado. He further alleges that as a result of these statements he was unable to practice medicine in Colorado. Dr. Burt asserts that the court

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1. Dr. Burt does not appeal the district court's ruling that the Board was immune. As an alternative ground for affirming the dismissal as to him, Dr. Connolly urges on appeal that he also is immune under the Eleventh Amendment. In addition, he contends that Nebraska is a more convenient forum for this action. These issues were not the basis for the district court's disposition and we do not address them here. Dr. Connolly is of course free to present these arguments to the district court on remand.

has personal jurisdiction over Dr. Connolly pursuant to Colorado's long-arm statute,[2] which provides in pertinent part:

> "Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> . . . . .
>
> The commission of a tortious act within this state. . . ."

Colo.Rev.Stat. § 13-1-124(1) (b) (1973).

In response, Dr. Connolly filed an affidavit asserting that he is a resident of Nebraska and that he has never done business of any kind in Colorado. Dr. Connolly further states that he owns no property in Colorado and was never physically present in Colorado in connection with the claim asserted by Dr. Burt.

The Colorado long-arm statute was intended to extend the jurisdiction of the Colorado courts to the fullest extent permitted by the due process clause of the United States Constitution. *Behagen v. Amateur Basketball Association of America*, 744 F.2d 731, 733 (10th Cir.1984). In this case the district court concluded that the action was technically within the reach of the long-arm statute because the alleged tort of defamation occurred in Colorado.[3] The court held, however, that personal jurisdiction

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2. In diversity cases, the federal district court's jurisdiction is co-extensive with that of the state courts. *See* Fed.R.Civ.P. 4(c).

3. "The tort of libel is generally held to occur wherever the offending material is circulated." *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S.Ct. 1473, 1479, 79 L.Ed.2d 790 (1984) (citation omitted).

APPENDIX D

THE UNIVERSITY OF NEBRASKA MEDICAL CENTER
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Omaha, Nebraska 68105

Department of Orthodpaedic Surgery
and Rehabilitation
(402) 599-4287

John F. Connolly, M.D.
Chairman
Joel Adams, M.D.
Ed Simodynes, M.D.
Chief Residents

CHILDREN'S ORTHOPAEDICS
Walter W. Huurman, M.D.

FRACTURES AND ADULT
RECONSTRUCTIVE SURGERY
John F. Connolly, M.D.
O. Max Jardon, M.D.

HAND AND MICROVASCULAR
SURGERY
Robert M. Cochran, M.D.
Michael Whalen, P.A.C.

ORTHOPAEDIC RESEARCH
Louis Lippiello, Ph.D.
Dennis Chakkalakal, Ph.D.

SPORTS MEDICINE—ATHLETIC
INJURIES
W. Michael Walsh, M.D.
Guy Shelton, R.P.T., A.T.C.

Mrs. Elizabeth A. Tretter
Administrative Assistant

October 21, 1980

Michael A. Lubchenco, M.D.

Director of Medical Education
Presbyterian Denver Hospital
1719 East 19th Avenue
Denver, Colorado 80218

RE: Andrew Kelly Burt, M.D.

Dear Doctor Lubchenco:

In reply to your inquiry about Doctor Burt, he did spend time here as an Orthopaedic Resident from 1974-1977. His performance was well below average and he has consequently not been recommended for Board eligibility. I think he might serve adequately in some field of medicine but not that of Orthopaedic Surgery.

Yours truly,

/s/ John F. Connolly, M.D.

Professor and Chairman

lat

The University of Nebraska-Lincoln The University of Nebraska at Omaha The University of Nebraska Medical Center